COMMENT

THE APPLICABILITY OF STATE ARBITRATION STATUTES TO PROCEEDINGS SUBJECT TO LMRA SECTION 301

"It is the policy of national labor legislation to promote the arbitral process."[1] This national labor policy has been expressed by the courts in their interpretation of section 301 of the Labor Management Relations Act.[2] A friendliness toward the arbitration process also emanates from many of the state legislative arenas.[3]

The United States Supreme Court, in *Textile Workers Union v. Lincoln Mills*,[4] held that section 301 authorized "federal courts to fashion a body of federal law for the enforcement of these collective bargaining agreements and includes within that federal law, specific performance of the promises to arbitrate grievances under collective bargaining agreements."[5] The Court's holding pre-empted state law with respect to collective bargaining agreements containing arbitration provisions and falling under section 301, and thus state courts must apply federal law in litigation involving such agreements.[6] This "federal law" is to be derived from the state laws, the Labor Management Relations Act, and other federal acts.[7]

Today arbitration is an invaluable tool in the area of labor relations and it has become an accepted and much lauded method

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[1] District 50, U.M.W. v. Revere Copper & Brass, Inc., 204 F. Supp. 349, 352 (D. Md. 1962). See also United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574 (1960).

[2] 61 Stat. 156 (1947), 29 U.S.C. § 185(a) (1947). The pertinent part of the section reads as follows:

> (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

[3] Goldberg, "A Supreme Court Justice Looks at Arbitration," 20 Arb. J. (n.s.) 13 (1965); see, *e.g.*, Retail Clerks Union, Local 770 v. Thriftimart, Inc., 30 Cal. Rptr. 12, 380 P.2d 652 (1963); Posner v. Grunwald-Marx, Inc., 14 Cal. Rptr. 297, 363 P.2d 313 (1961).

[4] 353 U.S. 448 (1957).

[5] *Id.* at 451.

[6] Local 174, Teamsters Union v. Lucas Flour Co., 369 U.S. 95 (1961).

[7] Textile Workers Union v. Lincoln Mills, *supra* note 4, at 456-57.

of settling disputes. Over ninety percent of the collective bargaining agreements have some provision for the use of arbitration.[8] These arbitration provisions vary, but they generally give the arbitrator the right to arbitrate only disputes "concerning the interpretation and application of some provision or provisions of this agreement."[9] The objectives of arbitration are naturally varied, being dependent upon the diverse factual situation involved. However, certain advantages generally accrue to those who choose to use arbitration rather than the courts to settle their disputes. These are: (1) The arbitration procedure is often more expedient;[10] (2) The arbitration procedure is often felt to be a fairer form of settlement, due to the arbitrator's expertise in a particular field;[11] (3) The arbitration procedure is often less expensive than its courtroom analogue.[12]

Disputes are generally processed by means of a grievance procedure. Such a procedure consists of a number of appellate steps, the uppermost step usually being arbitration. These grievance steps eliminate many of the more routine complaints that arise in labor-management relations so that relatively few reach arbitration. The grievance procedure helps the parties achieve their objective: continuance of work and industrial peace. It is the desire to avoid industrial strife in the form of a strike or lockout, not the avoidance of resort to the courts, that is the primary motive behind the use of arbitration by labor and management.[13] Labor-management disputes covered by an arbitration agreement may vary with the situation and the extent that the parties rely on the system. Typically included, however, are disputes as to the application or interpretation of bargained rules relating to pay, hours, and wrongful discharge.[14]

I. The Application of State Arbitration Statutes

Most states today have some type of arbitration statute.[15] These statutes typically define: (1) the type of arbitration agreements valid

8 Smith & Jones, "Management and Labor Appraisals and Criticisms of the Arbitration Process: A Report and Comments," 62 Mich. L. Rev. 1115, n.1 (1964).

9 Smith & Jones, "The Supreme Court and Labor Dispute Arbitration: The Emerging Federal Law," 63 Mich. L. Rev. 751, 754 (1965).

10 The court in United Steelworkers v. American Internat'l Aluminum Corp., 334 F.2d 147, 153 n.11 (5th Cir. 1964), *cert. denied*, 379 U.S. 991 (1965), referred to labor arbitration as "a catalyst in labor peace because of its speed."

11 Goldberg, *supra* note 3, at 13, 14.

12 *Ibid.*

13 Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957); General Electric Co. v. Local 205, UEW, 353 U.S. 547 (1957).

14 Goldberg, *supra* note 3, at 13, 14.

15 Fleming, "Arbitrators and the Remedy Power," 48 Va. L. Rev. 1199, 1200 (1962).

under state law; (2) the authority of the arbitrator; (3) the procedure and grounds for a stay of action pending arbitration; and (4) the procedure and grounds for modification, vacation or confirmation of the award. Any action, however, in the state courts involving arbitration between an employer and a union representing employees in an industry affecting interstate commerce is controlled by the Labor Management Relation Act, namely section 301.[16] Since federal law controls and since the rights of the parties are derived from section 301, the question posed is what effect the state arbitration statutes have on arbitration agreements falling under section 301. Since arbitration procedures are not expressly referred to in section 301, can a court properly apply state arbitration statute provisions in a section 301 proceeding? When the parties to a labor arbitration agreement rely upon section 301 to get before the court, can the court vacate the award, appoint the arbitrator, or enforce the arbitrator's issuance of a subpoena?

Since arbitration procedure varies among the states, a problem will arise. For example, assume an arbitration provision (within a section 301 collective bargaining contract) which fails to specify the manner of appointing the arbitrator should a grievance arise. In Ohio, the state statute provides for court appointment of an arbitrator where no such procedure has been set out in the agreement.[17] In Alabama, the statute provides that the arbitrator is to be chosen by the parties,[18] while in Indiana the statute is silent on the appointment of an arbitrator. If the parties are relying upon section 301 (which the Supreme Court has interpreted as requiring that a federal rule is to be formulated), should different results be permitted? Of what influence is local law in this situation and in other situations where state law is not uniform? Is a "per se application," a "prima facie application," or a "nonapplication" of state arbitration statutes proper? These classifications of the possible methods of applications of state statutes in a section 301 proceeding will subsequently be defined and analyzed.

"Per se application" means that the statute is applied without a consideration of any federal labor policy and all the provisions are necessarily applied to the arbitration proceedings. A per se application denotes a conclusion that the federal labor policy is not pertinent to the application of the state arbitration procedure statutes, and the statutes are to be applied according to their own legislative intent.

In a "prima facie application" the statutes are to be applied

[16] The requisite effects on interstate commerce must, of course, exist.

[17] Ohio Rev. Code Ann. § 2711.04 (Page 1953).

[18] Ala. Code tit. 7, §§ 829, 830 (1958).

unless there is a conflict with the federal labor policy. This policy must necessarily be determined by the court in each situation on a case by case method. If the application of the particular state arbitration provision in question would be at odds with federal labor policy, the provision would not be applied. If there is no clash, the provision would be applied.[19]

Since section 301 does not expressly require any particular arbitration procedure, "non-application" of the state statute would result if it was concluded that, because of the federal policy of favoring arbitration, the state arbitration statutes should only be used by the court as a guideline as to what a general federal "statute" should be. Rather than applying the statute of the particular state, the court would determine from all the statutes what the uniform provisions *should* be.

Thus, it must first be determined how the state arbitration statutes are to be applied. If it is found that the statutes should not be applied per se, then it would be necessary for the courts to look at the particular provisions within the statutes.

A. *Per se Application*

Since the right to sue for breach of a collective bargaining contract between an employer and a labor union representing employees in an industry affecting interstate commerce is derived from section 301, of what application are state arbitration statutes to arbitration provisions within such a contract? This question has its roots in the *Lincoln Mills* cases and was generally alluded to by the Supreme Court in *Dowd Box Co. v. Courtney*[20] where the court, noting the congressional concern over the breadth of section 301, stated that:

> [T]he record of the congressional debates on section 301 of the 1947 Act reflects the same concern with the adequacy of the laws of the various states as had been expressed the previous year in the discussion of section 10 of the Case bill. The Minority Report in the House in 1947 again discussed the availability of relief, the alternative means of recovery, and the scope of remedy in suits against labor organizations under the laws of the various states.[21]

In considering the pre-emptive force of section 301, it is necessary

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[19] This type of application must include a *de minimis* proviso or else it would be unmanageable. When the provision only has a minimum adverse effect on the federal policy the provision should still be applied.

[20] 368 U.S. 502 (1962).

[21] Section 10 of the Case bill is relatively the same provision as is presently § 301. *Id.* at 511.

to look at the national labor policy. The *Lincoln Mills* case[22] is the first important Supreme Court case involving section 301 and labor arbitration. *Lincoln Mills* involved a collective bargaining agreement that provided a grievance procedure, the ultimate step of which was arbitration. Certain grievances had arisen and had been handled according to the agreed preliminary procedure, but when arbitration was demanded by the union, the employer refused. The union then sought specific enforcement of the arbitration provision. The federal district court granted specific performance but the court of appeals reversed. Upholding the district court's decree the Supreme Court held that section 301 was more than merely jurisdictional, and that courts were to apply a federal substantive law which the courts were to fashion from the policy of our national labor laws.[23]

The Supreme Court has not yet faced the question of how the national labor policy affects the application of state arbitration statutes in proceedings under section 301. One must look at the legislative history behind section 301, the Supreme Court's interpretation of that legislative history, and court determinations of what the national labor arbitration policies are.

In *Lincoln Mills*, the Court held that labor arbitration provisions could be specifically enforced. This answered the question of the enforceability of arbitration provisions within contracts falling under section 301, but it did not answer the question of what procedure section 301 requires in these specifically enforced arbitration proceedings. The Court did give an indication of the impact of section 301 when it agreed that "the legislative history of section 301 is somewhat cloudy and confusing,"[24] then went on to state that "the substantive law to apply in suits under section 301(a) is federal law, which the courts must fashion from the policy of our national labor laws."[25] The problem left by the Court is what situations should be included within the term "substantive law."

In *Dowd Box Co. v. Courtney*,[26] the Court held that section 301 gave concurrent jurisdiction to both state and federal courts.[27] The fact that the state courts were held to have concurrent jurisdiction is not, however, necessarily a license to apply state arbitration procedures

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22 Note 4 *supra.*

23 *Ibid.*

24 *Id.* at 452.

25 *Id.* at 456.

26 368 U.S. 502 (1962).

27 There was no arbitration provision involved in the issue before the court in this case.

to collective bargaining agreements falling under section 301. The Court explains its interpretation of the legislative intent of section 301: "[T]he Labor Management Relations Act of 1947 represented a far-reaching and many-faced legislative effort to promote the achievement of industrial peace through encouragement and refinement of the collective bargaining process."[28] Such legislative intent would imply the inappropriateness of the per se application of state arbitration statutes. Since federal law is to be applied to cases within section 301, and since arbitration provisions within the collective bargaining agreements are part of the design to promote the achievement of industrial peace, a desire that there be a distinct federal arbitration procedure could be inferred from the *Dowd* case. Thus *Dowd* holds that achievement of industrial peace was the goal of section 301, and *Lincoln Mills* concludes that a federal substantive law must be created to promote the achievement of this end.[29]

State arbitration statutes can have an effect upon this "encouragement and refinement of the collective bargaining process" since labor arbitration is an integral part of the collective bargaining process and "since it has long been part of the emerging national labor policy to encourage voluntary arbitration as a way to industrial stability and peace, it was inevitable that labor arbitration would be accorded 'the central role . . . in effectuating national labor policy'."[30] An example of the extent to which the arbitration process is favored is shown by the Supreme Court's holding that a presumption in favor of the arbitrability of a dispute exists "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage."[31]

A particular state statutory provision may tend to discourage arbitration and thus have adverse effect upon an arbitration proceeding. For example, under many arbitration statutes, the arbitrator is given subpoena power. To illustrate the effect of the state statutes assume an arbitration clause in a collective bargaining agreement governed by section 301. A grievance arises, and it has reached the final stage in the grievance procedure—arbitration. During the arbitration proceeding it is learned that the key witness for one of the parties involved in the dispute will not appear voluntarily. If an arguably applicable state

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[28] Dowd Box Co. v. Courtney, 368 U.S. 502, 509 (1962).

[29] Textile Workers Union v. Lincoln Mills, *supra* note 4.

[30] Katz, "Arbitration-Favored Child of Pre-Emption," 17 N.Y.U. Conf. on Labor 27, 37 (1964).

[31] United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574, 582-83 (1960).

arbitration statute contains a subpoena provision, can the arbitrator issue a subpoena to a reluctant witness and have it judicially enforced by relying on section 301?[32] Would it make a difference if the dispute arose in a second state which does not have such a provision in its arbitration statute? Such questions suggest an interrelationship between state arbitration statutes and the labor arbitration process. Since the enforceability of the collective bargaining agreement containing the arbitration provisions is derived from section 301, must not the arbitrator's subpoena power, if any, also be derived from section 301, rather than from the state arbitration statutes? The Supreme Court in *Lincoln Mills* held that a federal right was created by section 301 and that the use of state law would be limited to "find[ing] the rule that will best effectuate the federal policy."[33] The applicable state law should include only those state arbitration statutes which are consistent with federal labor policy; that is, those statutes and statutory provisions which favor the arbitration process. "It is important for labor peace that the processes of arbitration not be permitted to fail."[34]

The courts have been constantly troubled by the interpretation of the federal law and the extent to which it should be applied in the arbitration area. The *Dowd* case,[35] holding that section 301(a) did not confer exclusive jurisdiction on the federal courts, the "trilogy" cases,[36] holding that the question of arbitrability was to be settled by the arbitrator and the *Lucas* case,[37] holding that the state courts can and must apply federal law in section 301 proceedings, all looked to see if the arbitration statutes involved were consistent with federal labor policy. Since the powers of the arbitrators are such a vital part of this favored arbitration system, and since without such powers the effectiveness of the arbitration proceedings would be seriously impaired, why should the arbitration procedures not be governed by federal labor policy? The intent of section 301, to create industrial peace and stability, has fostered a federal labor policy that favors the use of arbitration. Utilization of a state arbitration procedure statute without reference to this federal labor policy would strike at the heart of the stabilization of labor-management relations and thus defeat the

32 The subpoena power of the arbitrator will be discussed in detail, *infra*.

33 Textile Workers v. Lincoln Mills, *supra* note 4 at 457.

34 Deaton Truck Line, Inc. v. Local 612, Teamsters Union, 314 F.2d 418, 423 (5th Cir. 1962).

35 Dowd Box Co. v. Courtney, 368 U.S. 502 (1962).

36 United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574 (1960); United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960).

37 Local 174, Teamsters Union v. Lucas Flour Co., 369 U.S. 95 (1962).

thrust of section 301. First, however, there must be a determination of whether the arbitration statute favorably or adversely affects the arbitration proceeding with reference to that federal labor policy.

B. *Prima Facie Application or Non-application*

If the court holds that the state arbitration statutes should not be applied per se to collective bargaining agreements under section 301, it must then be determined whether there should be either a prima facie application or a non-application of those statutes. Non-application of state arbitration statutes to section 301 contracts would be advantageous to the national labor unions and employers who enter into nationwide agreements. The non-application of state statutes would create a steady growth of uniform national arbitration law. Once this national arbitration law has been developed, unions and employers could be assured that arbitration clauses in their national agreements would receive uniform treatment throughout the country. Although this advantage of uniformity will accrue to the negotiators of other labor arbitration agreements as well, it is of particular importance to the national agreements.

The basic question, however, is whether to interpret the Supreme Court's mandate to use state arbitration law as a guideline in a strict or in a liberal sense. Strict interpretation would mean that the statutes must be used only as a guide to a general overview of what is contained in all arbitration statutes and looked at in the light of section 301. This would evolve a form of national labor arbitration law. Non-application, however, in helping fashion a federal policy is not a practical solution. To so apply the state arbitration statutes would possibly result in a conglomeration of various court interpretations within the same state as to what should or should not be part of the federal policy. The mandate by the Supreme Court was vague, but that is no reason why the national labor policy fashioned as a result of that mandate must also be vague.

The state courts, as the federal courts, have not faced the problem of the applicability of their arbitration statutes to proceedings subject to section 301 to any great extent. There, however, have been instances where the courts did first consider federal labor policy.[38]

In *McCarroll v. Los Angeles County Dist. of Car.*,[39] the California

[38] The reason the courts may not have considered the question of the applicability of the state statutes may be due to administrative convenience. It is easy to look to the state statute and not attempt to determine what the federal policy is and whether any conflict exists.

[39] 49 Cal. 2d 45, 315 P.2d 322 (1957), *cert. denied*, 355 U.S. 932 (1958).

Supreme Court faced the question of whether a state court could issue an injunction in a suit under section 301, although, if brought in a federal court, the injunction presumably could not be issued because of the prohibition on federal courts against issuing injunctions in labor disputes. This was a suit by a contractor against the union for damages and injunctive relief against strikes allegedly caused by the unions. Although there was an arbitration provision within the collective bargaining agreement involved, the court said that it did not apply to the determination of whether this particular strike breached the no-strike clause in the agreement.[40]

In *McCarroll*, the court interpreted section 301 to "facilitate the enforcement of collective bargaining agreements by making unions suable as entities in the federal courts, and thereby to remedy the one-sided character of existing labor legislation."[41] The court had misinterpreted the legislative intent of section 301. Making the unions suable was only the *means* to industrial peace and stability, not an end in itself. The court did, however, look first to federal labor policy before determining whether the state court had the right to issue an injunction, realizing that federal law was controlling.

The dissent in *McCarroll* by Justice Carter points out very adequately that in *Lincoln Mills* a remedy was involved—that of specific performance.[42] Justice Carter said that "such remedy [injunctive relief] is more than mere procedure. It goes to the very essence of the right itself. In many instances, it would make the difference of whether or not the right could be truly realized."[43] He felt that federal law should apply. The provisions of the various state arbitration statutes likewise go to the very essence of this right. The subpoena power of the arbitrator, the power of the court to modify, and other provisions, all affect the outcome of the right asserted under section 301.

A California district court of appeals, in *Laufman v. Hall-Mack Co.*,[44] faced the question of the appealability of an order compelling arbitration. Neither party questioned that the case came within section 301. The problem arose because the order was not appealable under section 1294 of the California Code of Civil Procedure but would be appealable in a federal court. The court held that because state procedure applied, the order was not appealable. However, the court based its holding upon its finding that federal law encourages arbitra-

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[40] *Id.* at 67, 315 P.2d at 334.

[41] *Id.* at 63, 315 P.2d at 332.

[42] *Id.* at 72, 315 P.2d at 337.

[43] *Ibid.*

[44] 215 Cal. App. 2d 87, 29 Cal. Rptr. 829 (Dist. Ct. of App. 1963).

tion and the California policy behind their state procedure "is even more encouraging of the use of arbitration than is the federal procedure."[45] The court also went on to explain that "if appellant loses in arbitration it then has a statutory right of appeal under section 1294 of the Code of Civil Procedure."[46] Thus, after looking at the federal labor policy and its purpose and concluding that the state procedure was consistent with this federal labor policy, the court applied the state arbitration procedure. The court avoided a direct clash between federal policy and state procedure by finding both were, in reality, supplemental. Such an application by other state courts of their arbitration statutes would require those courts to do as California did; look to the state arbitration statute, determine if the provision in question conformed with the federal labor policy, and if so, apply the statute.

The rationale of the court in *Laufman* is consistent with the Supreme Court's suggestion that "state law, if compatible with the purpose of section 301, may be resorted to in order to find the rule that will best effectuate the federal policy."[47] But the Supreme Court has warned that, any state law applied, "will be absorbed as federal law and will not be an independent source of private rights."[48] To comply properly with the Supreme Court's mandate to apply federal law in section 301 cases and the mandate to adhere to the federal policy of favoring the arbitration process when it is a section 301 collective bargaining agreement, the state courts should not indiscriminately apply state arbitration statutes. Those statutes can affect the substance of the controversy and are not *mere* "procedures."[49]

These cases have shown the flexibility and practicality of a prima facie application of state arbitration statutes. The prima facie application used by the courts, in *McCarroll v. Los Angeles County Dist. of Car.*[50] and *Laufman v. Hall-Mack Co.*,[51] is a more practical approach to the overall problem of application than a per se or non-application. It will result in a more uniform handling of labor arbitration in section 301 contracts. The parties need to have some definite rules set down in order to be able to formulate effectively an arbitration provision within their collective bargaining contract that best suits their interests.

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45 *Id.* at 89, 29 Cal. Rptr. at 831.

46 *Id.* at 89-90, 29 Cal. Rptr. at 831.

47 Textile Workers Union v. Lincoln Mills, *supra* note 4, at 457.

48 *Id.* at 457.

49 See text beginning notes 66 *infra.*

50 49 Cal 2d 45, 315 P.2d 322 (Cal. 1957), *cert. denied*, 355 U.S. 932 (1958).

51 215 Cal. App. 2d 87, 29 Cal. Rptr. 829 (Dist. Ct. of App. 1963).

Without the state statutes to look to, the parties would be forced to wait for a case-by-case creation of an arbitration procedure by the courts. A prima facie application of the arbitration statutes would give this needed definiteness and would at the same time comply more closely to the Supreme Court's mandate than the other two methods of application.

There will, naturally, be *de minimis* clashes in some situations, but the courts, for the sake of convenience and practicality, should not concern itself with such minimal clashes. For example, time requirements for filing an application to vacate an award might vary from state to state. The advantage of having such statutes of limitation would override any disadvantages arising from the non-uniformity of such statutes between the states.

The practicality of the prima facie application of state arbitration statutes is considerable although, naturally, it alone is not determinative of whether such a rule of application can be followed. The attorneys, arbitrators, and parties, as well as the courts involved in the arbitration, need guidelines which can well be supplied by the state statutes. Attorneys, arbitrators, parties, and courts are usually quite familiar with their own individual state statutes and can thus work more effectively under them than they could under a new and foreign set of requirements or under no specific set at all in order to achieve the goal of federal labor policy that encourages arbitration in labor disputes.

II. A Survey of State Arbitration Procedure Statutes

Once it has been determined that there should be a prima facie application of state arbitration statutes to section 301 contracts, it follows that it must then be determined whether a specific provision or the lack of a specific provision of an arbitration statute conflicts with a federal labor policy that promotes arbitration in labor disputes.[52]

The state arbitration statutes of California,[53] Illinois,[54] Ohio,[55] and New York[56] are representative of the modern statutes and these states have experienced a considerable amount of litigation. Their experience over labor arbitration presents a relatively accurate picture of the problems with respect to labor arbitration and section 301 along with possible solutions.

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[52] Such a determination is obviously irrelevant where there is either a per se or a non-application of the state statute.

[53] Cal. Civ. Proc. Code §§ 1280-1289.

[54] Ill. Ann. Stat. ch. 10, §§ 101-123 (Smith-Hurd 1964).

[55] Ohio Rev. Code Ann. §§ 2711.01-2711.15 (Page 1953).

[56] N.Y. Civ. Prac. Law §§ 7501-7514.

A. *Statutes That Exclude Labor Arbitration Agreements From Coverage*

Several state arbitration statutes do not cover labor arbitration agreements,[57] as they do not "apply to contracts between employers and employees, or between employers and associations of employees . . . ."[58] These statutes pose a problem of whether a state *can* exclude proceedings subject to section 301 from the purview of its arbitration statutes. If the state can do so, where are the courts to look for guidance when a case involves a labor arbitration question? There

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[57] The state statutes that today arguably attempt to exclude labor agreements within collective bargaining contracts include: La. Rev. Stat. § 9:4216 (1950) "[the statute not] apply to contracts of employment of labor or to contracts for arbitration which are controlled by valid legislation of the United States . . ."; Md. Ann. Code art. 7, § 1 (1965)—"not apply to an arbitration agreement between employers and employees or between their respective representatives unless it is expressly provided in such agreement that this article shall apply"; Mich. Stat. Ann. § 27A.5001 (1962)—the statute does not "apply to collective contracts between employers and employees or associations of employees in respect to terms or conditions of employment."; Ore. Rev. Stat. § 33.210 (1963)—this statute excludes agreements on the "terms or conditions of employment under collective contracts between employers and employes or between employers and association of employes . . ."; Tex. Rev. Civ. Stat. Ann. art. 224 (Supp. 1965)—does not apply "to any labor union contract or to any arbitration agreements or to any arbitrations held pursuant to agreements between any employer and any employee of that employer or between their respective representatives . . ."; Wis. Stat. Ann. § 298.01 (1958)—"the provisions of this chapter shall not apply to contracts between employers and employes, or between employers and associations of employes . . . ." Several states do not have a general arbitration statute, for example: Alaska, Colorado, Delaware, Oklahoma, South Dakota, and Vermont.

Other states have had similar arbitration provisions excluding collective bargaining agreements. See, *e.g.*, Gates v. Arizona Brewing Co., 95 P.2d 49, 51 (Sup. Ct. Ariz. 1939), which held that the old arbitration statute, Ariz. Code § 4294 (1928), excluded collective bargaining agreements when it stated that "the provisions of this act shall not apply to collective contracts between employers and employees, or between employers and association of employers, in respect to terms or conditions of employment." See also Utility Workers Union v. Ohio Power Co., 36 O. Ops. 324, 77 N.E.2d 629 (C.P. Ohio 1947), which similarly interpreted the Ohio arbitration statute (before the statute's amendment) to exclude collective bargaining contracts.

[58] Wis. Stat. Ann. § 298.01 (1958). The Wisconsin Supreme Court has held that as the court interprets this proviso, labor arbitration provisions within collective bargaining contracts are valid but unenforceable. Local 1111, United Electrical Workers v. Allen-Bradley Co., 259 Wis. 609, 49 N.W.2d 720 (1951). This interpretation was explained further in Dumphy Boat Corp. v. Wisconsin Employment Relations Bd. 267 Wis. 316, 64 N.W.2d 866 (1954). The Wisconsin Supreme Court said that the *Allen-Bradley* case held that the *court* could not enforce the arbitration agreement but that the state-created Wisconsin Employment Relations Board, under § 111 *et al.* could so enforce the agreement. This qualification is not relevant to the immediate question presented here. Amended by Wis. Pub. Acts 1962, No. 27.

is no doubt that a suit involving an arbitration provision contained in a collective bargaining agreement within the scope of section 301 can be brought in a state court without concern of whether that state excludes labor agreements from the coverage of its arbitration statutes. It is the question of what procedures to apply to these arbitration provisions that creates concern.

Suppose, for example, that a collective bargaining agreement was signed between a Michigan employer and a union that represented employees in an industry affecting interestate commerce. The contract included an arbitration agreement but did not provide for the appointment of an arbitrator. In a controversy before the court on the issue of whether the court can appoint the arbitrator to settle a labor dispute between the union and the company, could the court point to the Michigan statute with its provision permitting the court to appoint an arbitrator in such a situation, and thus appoint the arbitrator?[59] Or need the court concern itself at all with the state statute when the action is within section 301?[60]

Congress has established in section 203(d) of the National Labor Management Relations Act,[61] a national policy of promoting arbitration in the settlement of labor disputes. This indicates that a liberal application of arbitration procedures under section 301 was intended. Thus, a state arbitration statute containing an exclusionary provision should still be applied prima facie, but if a section is found to clash with the federal policy in a particular instance, the state court should look to other state statutes and the Federal Arbitration Act.[62] Judge Wyzanski stated in *Textile Workers Union v. American Thread Co.*,[63]

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[59] Mich. Stat. Ann. § 27A.5015 (1962).

> If the arbitration agreement provides a method of appointment of arbitrators, this method shall be followed. In the absence thereof, or if the agreed method fails or for any reason cannot be followed, or when an arbitrator appointed fails or is unable to act and his successor has not been duly appointed, the court on application of a party shall appoint one or more arbitrators. An arbitrator so appointed has all the powers of one specifically named in the agreement.

[60] The specific problem of court appointment of arbitrators will be discussed in detail *infra*.

[61] 61 Stat. 153 (1947), 29 U.S.C. § 173 (1964), Functions of [Federal Mediation and Conciliation] Service.

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(d) Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement. The Service is directed to make its conciliation and mediation services available in the settlement of such grievance disputes only as a last resort and in exceptional cases."

[62] 9 U.S.C. §§ 1-14 (1964).

[63] 113 F. Supp. 137 (D. Mass. 1953).

what was later implied by the Supreme Court in *General Electric Co. v. Local* 205,[64] when he said that the Federal Arbitration Act should be used as a "guiding analogy." Thus both the Federal Arbitration Act and a state statute can supplement one another in defining federal labor policy. The court first, however, should naturally make a prima facie application of its own state statute since it may well be that it is a violation of federal labor policy to exclude section 301 agreements from coverage.

If it is irrelevant under section 301 that the state arbitration statute excludes collective bargaining agreements from its coverage, then labor arbitration agreements have the same status regardless of whether the state arbitration law has excluded them. Thus, the question of conflict between state arbitration statutes and a federal policy of promoting arbitration arises in states whose statutes include collective bargaining agreements as well as in states whose statutes exclude them.

When there is no state statute to supply a procedure the court must necessarily look to outside sources.[65]

B. *The Subpoena Power of the Arbitrator*

State arbitration statutes often give the arbitrator the power to issue subpoenas[66] (usually at the initiation of the parties) for the

[64] 353 U.S. 547 (1957).

[65] The states without a general arbitration statute include: Alaska, Colorado, Delaware, Oklahoma, South Dakota, and Vermont.

[66] The following states have provisions for use of the subpoena power in arbitration: Ala. Code tit. 7, § 837 (1958)—arbitrator only has power to call witnesses; Ariz. Rev. Stat. Ann. § 12-1507 (Supp. 1965); Ark. Stat. Ann. § 34-504 (1962); Cal. Civ. Proc. § 1286; Conn. Gen. Stat. Ann. § 52-412 (1960); Fla. Stat. Ann. § 57.17 (Supp. 1965); Hawaii Rev. Laws § 188-7 (1955); Ill. Ann. Stat. ch. 10, § 107 (Smith-Hurd Supp. 1965); Ind. Ann. Stat. § 3-207 (1933)—justice of the peace must issue the subpoena; Iowa Code Ann. § 679.5 (Supp. 1965); Kan. Gen. Stat. Ann. § 5-204 (1964)—justice of the peace or clerk of district court must issue the subpoena; Ky. Rev. Stat. Ann. § 417.013 (1963); La. Rev. Stat. § 9:4206 (1950); Me. Rev. Stat. Ann. ch. 26, § 956 (1964); Md. Ann. Code art. 7, § 7(a) (1965); Minn. Stat. Ann. § 572.14 (Supp. 1965); Mo. Ann. Stat. § 435.040 (1949)—arbitrator only has the power to call witnesses; Miss. Code Ann. § 285 (1956)—must be issued by the clerk of the court or justice of the peace; N.H. Rev. Stat. Ann. § 542:5 (1955)—arbitrator only has power to call witnesses; N.J. Rev. Stat. § 2A:24-6 (1952); N.Y. Civ. Prac. Law § 7505; N.C. Gen. Stat. § 1-553 (1953); N.D. Cent. Code § 32-29-05 (1960)—county justice must issue the subpoena; Ohio Rev. Code Ann. § 2711.06 (Page 1953); Ore. Rev. Stat. § 33.280(1) (1965); Pa. Stat. Ann. tit. 5, § 166 (1963); R.I. Gen. Laws Ann. § 10-3-8 (1956); S.C. Code Ann. § 10-1903 (1962); Tenn. Code Ann. § 23-509 (1955)—issued by the justice of the peace or the clerk of the court; Tex. Rev. Civ. Stat. Ann. art. 230(c) (Supp. 1965); Utah Code Ann. § 78-31-10 (1953); Wash. Rev. Code § 7.04.110 (1961); Wis. Stat. Ann. § 298.06 (1958); Wyo. Stat. Ann. § 1-1048.9(a) (Supp. 1963).

attendance of witnesses, for the production of books, records and other evidence, and for various other reasons.[67] If in a section 301 arbitration, there is a clash with the federal policy of favoring arbitration when a prima facie application of the subpoena provision is made, no such subpoena provision can then be utilized by the arbitrator.[68]

There is no doubt that the existence of a subpoena power in the arbitrator would affect arbitration. Such a power in the arbitrator arguably would enhance the effectiveness of arbitration. The arbitrator then would be able to take a more active role in the arbitration proceed-

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[67] See, *e.g.*, the following divisions of Ill. Ann. Stat. ch. 10, § 107 (Smith-Hurd Supp. 1965):

(a) The arbitrators may issue subpoenas for the attendance of witnesses and for the production of books, records, documents, and other evidence, and shall have the power to administer oathes. Subpoenas so issued shall be served, and upon application to the court by a party or the arbitrators, enforced, in the manner provided by law for the service and enforcement of subpoenas in civil cases.

(b) On application of a party and for use as evidence, the arbitrators may permit a deposition to be taken, in the manner and upon the terms designated by the arbitrators, of a witness who cannot be subpoenaed or is unable to attend the hearing.

(c) All provisions of law compelling a person under subpoena to testify are applicable . . . .

[68] The courts of the four states investigated, California, Illinois, Ohio, and New York, did not question whether the arbitrator has subpoena power. The cases indicated that the courts assumed the arbitrator had such power. Although the cases did not state whether the labor arbitration in question came within § 301, the cases do indicate the state courts' general liberality toward the arbitration process.

In The Matter of Re-Anne Manufacturing Corp. 1 Misc. 2d 717, 720, 149 N.Y.S.2d 161, 165 (Sup. Ct. 1955), the court held that "an arbitrator can compel *even one not a party to the agreement* to produce books and records if such documents are shown to be pertinent, material or necessary to any matter lawfully under consideration before him." (Emphasis added.) In Local 99, I.L.G.W.U., AFL-CIO v. Clarise Sportswear Co., 44 Misc. 2d 913, 255 N.Y.S.2d 282 (Sup. Ct. 1964), the court held that a labor arbitrator is limited by the authority granted him in the contract and in this case could require the party in question to produce only those books and records permitted by the contract. The court in Katz v. Uvegi, 18 Misc. 2d 576, 582, 187 N.Y.S.2d 511, 517 (Sup. Ct. 1959), *aff'd*, 11 App. Div. 2d 773, 205 N.Y.S.2d 972 (1960), stated that though arbitrators "may not be judges in name, they are judicial officers acting in a quasi-judicial capacity and should possess the judicial qualifications of fairness to both parties, so that they may render a faithful, honest, and disinterested opinion."

An Illinois court has concluded that "as a general rule, the power and authority of arbitrators is derived from and determined by the arbitration agreement under which they were appointed and by the provisions of the statute. The agreement and the statutes should be read in harmony, if possible." West Towns Bus Co. v. Division 241 Amalgamated Ass'n of Street Electric Ry. Motor Coach Employees, AFL-CIO, 26 Ill. App. 2d 398, 406, 168 N.E.2d 473, 476-77 (1960). The implication of this statement is that the courts will look first to the agreement to determine the intent of the parties, a procedure which should be done in determining whether a statutory provision violates the federal policy of favoring arbitration.

ings than if there were no such subpoena power. Arguments that the arbitrator might abuse the subpoena power and that they do not have the judicial prowess to use the power pertain to whether an arbitrator *should* have subpoena power. Although there are arguments against the grant of such power at the legislative level, they are not relevant as to whether section 301 grants or denies such a power to the arbitrator.

Beginning with the premise that the state statutes are to be applied in proceedings subject to section 301 unless they clash with federal labor policy, a consideration of the possible existence of such a clash is necessary. The denial of subpoena power to the arbitrator could arguably frustrate the contractual intentions of the parties. The customs in the particular industry, past agreements, past use of subpoena power by the parties involved, and state arbitration statutes granting such power, define the intention of the parties along with the words of the contract itself. If the parties expressly exclude the use of the subpoena power in the agreement, there is no federal policy barring such exclusion since federal policy attempts to let the parties themselves determine their arbitration process. But if the parties intended the arbitrator to have subpoena power, their federal right would require the fulfillment of this intention. Basing the existence of the power on the contract would be a radical departure from previous statutes that expressly grant subpoena power to an administrative agency. But, as here, where the federal policy would seem to dictate the grant of subpoena power to the arbitrator, such a grant should be implied through section 301. If the state statute is not applicable per se as indicated above, it cannot be said that the state statute was incorporated into the contract.[69] To effectuate the federal policy of favoring the arbitration process, it is necessary to take a practical approach to the problem and look at the situation in reverse order. That is, if no subpoena power was given to the arbitrator because section 301 arguably barred such an allocation of power, and if any arbitrator operating under a section 301 collective bargaining agreement could not exercise subpoena power, the legislative intent to have disputes settled by the methods agreed to by the parties would be greatly hindered.

The Federal Arbitration Act, in section 7, grants subpoena power to the arbitrator with enforcement by the district court.[70] Using this as a guideline as to what the legislature felt should be necessary to

[69] See Monte v. Southern Delaware County Authority, 321 F.2d 870, 872 (3d Cir. 1963).

[70] 9 U.S.C. § 7 (1964).

permit the parties to settle their own disputes, it would appear that the subpoena power of the arbitrator cannot be relinquished without placing an almost insurmountable roadblock to an effective arbitration proceeding.

The federal policy that is to be adhered to is the encouragement of the use of arbitration in labor disputes. State legislatures have felt that an arbitrator should have subpoena power, and a majority of the states have provided for this power in their statutes.[71] Without the subpoena in arbitration of labor disputes there would be a limitation of the effective use of arbitration. The parties would not be as willing to resort to arbitration if they know they might be stymied in the use of the proceeding.

Taking together the federal policy of encouragement of labor arbitration, the federal and state legislative intent to provide subpoena power to arbitrators and the Supreme Court's directive to use these state statutes as possible guidelines, the subpoena power should be granted to the arbitrator when the proceedings are subject to section 301, even in states not specifically granting subpoena power in their statutes.[72]

C. *Order to Compel or Stay Arbitration; Stay of Action*

Many state arbitration statutes provide for the application by parties allegedly aggrieved for an order to compel or stay the arbitration or for an order to stay a court action pending the outcome of an arbitrable issue.[73]

The Supreme Court's holding in *Lincoln Mills* removed any doubt

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[71] See note 66 *supra.*

[72] Those states without subpoena power include: Georgia, Idaho, Massachusetts, Michigan, Montana, Nebraska, New Mexico, Virginia, and West Virginia.

[73] See, *e.g.*, the following section of N.Y. Civ. Prac. Law:

§ 7503. Application to compel or stay arbitration; stay of action; notice of intention to arbitrate.

(a) Application to compel arbitration; stay of action. A party aggrieved by the failure of another to arbitrate may apply for an order compelling arbitration. Where there is no substantial question whether a valid agreement was made or complied with, . . . the court shall direct the parties to arbitrate. Where any such question is raised, it shall be tried forthwith in said court. If an issue claimed to be arbitrable is involved in an action pending in a court having jurisdiction to hear a motion to compel arbitration, the application shall be made by motion in that action. If the application is granted, the order shall operate to stay a pending or subsequent action, or so much of it as if referable to arbitration.

(b) Application to stay arbitration . . . . [A] party who has not participated in the arbitration and who has not made or been served with an application to compel arbitration, may apply to stay arbitration on the ground that a valid agreement was not made or has not been complied with . . . .

about whether courts may order arbitration in controversies covered by arbitration agreements. Whether or not the state arbitration statute provides for such an order by the court, the court should be able to specifically enforce such an agreement. Without the ability to enforce, the court would be deprived of its most effective means of encouraging the arbitration of labor disputes.

Arbitration statutes often contain a provision to stay a pending action if there is an arbitrable issue involved.[74] The courts in the four states studied in detail did not question their right, in the labor arbitration area, to grant a stay of an action pending arbitration.[75] Arguments against judicial grants of stays where the arbitration is subject to section 301 point out that there has been no specific grant of such power to the courts. Traditionally, the courts have only been known to possess the authority to specifically enforce arbitration agreements contained within collective bargaining contracts. Thus, goes the argument, parties have only the section 301 right to enforcement of their contract. But to accept this position is to construe too strictly the substantive rights granted by section 301, a fact evidenced by the Court's liberal approach in *Lincoln Mills*.

The application for a stay of action is treated as an extension of the request for specific performance of an arbitration provision in the *Lincoln Mills* case. There is no doubt that this authority of the court

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[74] The states with provisions for stay of action include: Ala. Code tit. 7, § 829 (1958); Ariz. Rev. Stat. Ann. § 12-1502(D) (Supp. 1965); Cal. Civ. Proc. § 1281.4 (Supp. 1965); Conn. Gen. Stat. Ann. § 52-409 (1958); Fla. Stat. Ann. § 57.12(3) (Supp. 1965); Hawaii Rev. Laws § 188-5 (1955); Ill. Ann. Stat. ch. 10, § 102 (Smith-Hurd Supp. 1965); La. Rev. Stat. § 9:4202 (1950); Me. Rev. Stat. Ann. ch. 26, § 952 (1964); Md. Ann. Code art. 7, § 2(d) (1965); Mass. Ann. Laws ch. 150D § 2(d) (1965); N.H. Rev. Stat. Ann. § 542:2 (1955); N.J. Rev. Stat. 2A:24-4 (1952); N.Y. Civ. Prac. Law § 7503(a); Ohio Rev. Code Ann. § 2711.02 (Page 1953); Ore. Rev. Stat. § 33.240 (1965); Pa. Stat. Ann. tit. 5, § 162 (1963); R.I. Gen. Laws Ann. § 10-3-3 (1956); Tex. Rev. Civ. Stat. Ann. art. 225(d) (Supp. 1965); Wash. Rev. Code § 7.04.030 (1961); Wis. Stat. Ann. § 298.02 (1958); Wyo. Stat. Ann. § 1-1048.4(d) (Supp. 1963).

[75] The California courts have dealt with applications in labor disputes for a stay of action pending arbitration without first determining whether the courts had authority to issue such a stay of action. McCarroll v. Los Angeles County Dist. Council of Carp., 49 Cal. 2d 45, 65, 315 P.2d 322, 333 (1957), *cert. denied*, 355 U.S. 932; Thriftimart, Inc. v. Superior Court, 202 Cal. App. 2d 421, 21 Cal. Rptr. 19 (Dist. Ct. App. 1962); Grunwald-Marx, Inc. v. Los Angeles Joint Bd. Amalgamated Clothing Workers, 192 C.A.2d 268, 13 Cal. Rptr. 446 (Dist. Ct. App. 1961). Neither have the New York courts discussed the possible conflict by an application to stay a proceeding under § 301. See, *e.g.*, Long Island Lumber Co. v. Martin, 15 N.Y.2d 380, 259 N.Y.S.2d 142 (1965); Parker v. Borock, 286 App. Div. 851, 141 N.Y.S.2d 359 (1955); Diamond v. Robert Hall Clothes, Inc., 6 Misc. 2d 916, 164 N.Y.S.2d 112 (Sup. Ct. 1957). No cases could be located in Ohio or Illinois dealing with an application for a stay of action in a labor arbitration proceeding.

to grant a stay of action comes within section 301; any refusal or avoidance of an arbitrable issue being submitted to an arbitration proceeding is a violation of the collective bargaining agreement. The question of whether the court's authority to issue the stay is derived from the state statute or from the federal policy supporting section 301 is more academic than practical. The result in either case is the same. To be consistent with the federal policy, the answer would have to be that the stay power of the state court comes from section 301 itself and the state statute was utilized through a prima facie application of that statute.[76]

If there is no stay provision within the statute or there is no arbitration statute at all, the state court should still have the authority to grant a stay in the appropriate cases. The remedy of specific enforcement being available, assuming no waiver of the arbitration provisions by the moving party, there is no logical reason why a stay cannot be granted. Not to grant the stay would be in effect to deny specific performance. Thus the moving party would be deprived of his federal right because of lack of a statutory provision or a state statute. There is no great difficulty in making the jump from allowing the issuance of a stay of a court action, when a statute so permits, to allowing the stay when the statute is silent or absent. Not to allow the jump would conflict with the federal policy.

Some arbitration statutes provide for a stay of arbitration only under certain circumstances.[77] If the purpose of allowing such a stay is only to enforce compliance with a valid agreement against a recalcitrant,[78] it is no more than contract law. Or, if the local statute provides that "the court may stay an arbitration proceeding commenced or

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[76] The Supreme Court has indicated this consideration of federal policy when it held that a contract could be interpreted to give the arbitrator authority over damage claims, so that an employer's suit in a federal court under § 301 must be stayed pending arbitration. The Court said that "under our federal labor policy, therefore, we have every reason to preserve the stabilizing influence of the collective bargaining contract . . . . We can enforce both the no-strike clause and the agreement to arbitrate by granting a stay . . . . Drake Bakeries v. Bakery Workers, 370 U.S. 254, 263-64 (1962).

[77] The states that provide for stay of arbitration in their statutes include: Ariz. Rev. Stat. Ann. § 12-1502(B) (Supp. 1965); Fla. Stat. Ann. § 57.12(4) (Supp. 1965); Ill. Ann. Stat. ch. 10, § 102(b) (Smith-Hurd 1964); Md. Ann. Code art. 7, § 2(b) (1965); Mass. Ann. Laws ch. 150C § 2(b) (1965); N.Y. Civ. Prac. Law § 7503(b); R.I. Gen. Laws Ann. § 10-3-5 (1956); Tex. Rev. Civ. Stat. Ann. art. 225(B) (Supp. 1965); Wash. Rev. Code Ann. § 7.04.040(4) (1961); Wyo. Stat. Ann. § 1-1048.4(b) (Supp. 1963).

[78] See, *e.g.*, N.Y. Civ. Prac. Law § 7503(b): "[A] party who has not participated in the arbitration and who has not made or been served with an application to compel arbitration may apply to stay arbitration on the ground that a valid agreement was not made or has not been complied with . . . ."

threatened on a showing that there is no agreement to arbitrate,"[79] the court is merely determining the existence of a valid arbitration contract. Courts would seem to have such authority even in the absence of a statute since the collective bargaining contract contains the arbitration provision which will be stayed. It has been held that no contracting party can be compelled to submit to arbitration any matter which he has not agreed to arbitrate.[80] But since the parties generally have contracted to so arbitrate, the federal policy desires to give effect to such agreements whenever possible and thus a stay of arbitration cannot generally be granted, unless it is upon the basis of general contract law that no agreement exists.[81] To maintain consistency in the arbitration procedures, the test for stay of arbitration should necessarily be the same as that for an action to compel arbitration.[82] The court should not look into the question of arbitrability of the issue. The court should only determine whether there is a valid arbitration agreement and then if such an agreement is found, let the arbitrator determine the question of arbitrability.

D. *Vacation or Modification of the Award*

The vast majority of state arbitration statutes contain a provision permitting a court to declare an award void under certain conditions.[83]

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[79] Ill. Ann. Stat. ch. 10, § 102 (Smith-Hurd Supp. 1964).

[80] United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574, 582 (1960); Vulcan-Cincinnati, Inc. v. United Steelworkers, AFL-CIO, 289 F.2d 103 (6th Cir. 1961).

[81] A federal court has said: "[A]rbitration is a contractual procedure . . . . If the parties, for their own good reasons, have bargained for determination of controversies by arbitration rather than by a court, such agreement must prevail." General Warehousemen & Employees Union No. 636 v. American Hardware Supply Co., 329 F.2d 789, 792 (3d Cir. 1964).

[82] United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574 (1960); United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

[83] See, for example, the following section of Cal. Civ. Proc. Code (Supp. 1965):
§ 1286.2 Grounds for Vacation of Award:
[T]he court shall vacate the award if the court determines that:

(a) The award was procured by corruption, fraud, or other undue means;

(b) There was corruption in any of the arbitrators;

(c) The rights of such party were substantially prejudiced by misconduct of a neutral arbitrator;

(d) The arbitrators exceeded their powers and the award cannot be corrected without affecting the merits of the decision upon the controversy submitted; or

(e) The rights of such party were substantially prejudiced by the refusal of the arbitrators to postpone the hearing upon sufficient cause being shown therefore or by the refusal of the arbitrators to hear evidence material to the controversy or by other conduct of the arbitrators contrary to the provisions of this title.

The existence of this power is generally consistent with section 301.[84] The ability of the court to vacate an award is generally limited to certain specified grounds. Although both parties submit to arbitration as required by an arbitration agreement, the defect might well come when the arbitrator issues the award. The award of the arbitrator is normally final and conclusive, and courts will not review the merits of the dispute.[85] Thus, it is apparent that state legislatures have great faith in the arbitration process. The collective bargaining agreement contemplates an unprejudiced, unbiased award, and it follows that if an award is not made impartially or without bias the agreement has not been fulfilled.[86] Without a procedure for vacation or modification the courts would be at a loss as to correcting the prejudice suffered by either party.

Problems do arise when some of the possible grounds are relied on by the court. For example, the court which sets aside an award because the arbitrator refused to hear evidence material to the controversy[87] may run afoul of the prohibition on the court's determination of the merits. If the federal courts view such a provision as being contrary to federal labor arbitration policy, the award cannot be set aside on the theory that the decision of the arbitrator was not supported by the evi-

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[84] The states that have a provision in their arbitration statutes for vacation of an award, include: Ala. Code tit. 7 § 842 (1958); Ariz. Rev. Stat. Ann. § 12-1512 (Supp. 1965); Ark. Stat. Ann. 34-509 (1962); Cal. Civ. Proc. § 1286.2 (Supp. 1965); Conn. Gen. Stat. Ann. § 52-418 (1958); Fla. Stat. Ann. § 57.22 (Supp. 1965); Ga. Code Ann. § 7.111 (Supp. 1965); Hawaii Rev. Laws § 188-9 (1955); Idaho Code Ann. § 7-907 (1947); Ill. Ann. Stat. ch. 10, § 112 (Smith-Hurd Supp. 1965); Iowa Code Ann. § 679.12 (1950); Kan. Gen. Stat. Ann. § 5-211 (1964); Ky. Rev. Stat. Ann. § 417.018 (1963); La. Rev. Stat. § 9:4210 (1950); Mass. Ann. Laws ch. 150C, § 11 (1965); Me. Rev. Stat. Ann. ch. 26, § 958 (1964); Md. Ann. Code art. 7, § 12 (1965); Minn. Stat. Ann. § 572.19 (Supp. 1965); Miss. Code Ann. § 290 (1956); Mo. Ann. Stat. § 435.100 (1949); Mont. Rev. Code Ann. § 93-201-7 (1964); Neb. Rev. Stat. § 25-2115 (1964); Nev. Rev. Stat. § 38.170 (1963); N.H. Rev. Stat. Ann. § 542:8 (1955); N.J. Rev. Stat. § 2A:24-8 (1952); N.Y. Civ. Prac. Law § 7511(b); N.C. Gen. Stat. § 1-559 (1953); N.D. Cent. Code § 32-29-08 (1960); Ohio Rev. Code Ann. § 2711.10 (Page 1953); Ore. Rev. Stat. § 33.330 (1963); Pa. Stat. Ann. tit. 5, § 170 (1963); R.I. Gen. Laws Ann. § 10-3-12 (1956); Tenn. Code Ann. § 23-514 (1955); Tex. Rev. Civ. Stat. Ann. art. 237 (Supp. 1965); Utah Code Ann. § 78-31-16 (1953); Va. Code Ann. § 8-506 (1957); Wash. Rev. Code § 7.04.160 (1961); W. Va. Code Ann. § 5502 (1961); Wis. Stat. Ann. § 298.10 (1958); Wyo. Stat. Ann. § 1-1048.14 (Supp. 1963).

[85] United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); Atchison, T. & S.F. R.R. Co. v. Brotherhood of Railroad Trainmen, 229 Cal. App. 2d 607, 40 Cal. Rptr. 489 (1964).

[86] The grounds listed in the provision cited *supra* note 83, indicate that the courts would grant such vacation only when the agreement has not been fairly adhered to.

[87] Cal. Civ. Proc. § 1286.2(e) (Supp. 1965).

dence.[88] Since the arbitrator's powers come from the collective bargaining agreement, any powers exercised by him beyond those given him in the agreement are a violation of the contract and enforcement of such an award would be sanctioning a violation of the collective bargaining agreement. The vacation of the award is a practical way to enforce the federal right created by section 301. The grounds for vacation should be limited to offenses committed by the arbitrator which adversely affect this federal right of the parties under section 301 and not, for example, grounds which would clash with any federal arbitration law.

The state courts have held that the court cannot review the merits of the arbitrator's decision,[89] and that the question of arbitrability itself[90] is barred after an award has been rendered. These holdings rely upon the "trilogy" cases[91] for such a holding. Effective labor arbitration requires that the arbitrator's decision have finality,[92] but the question of arbitrability should be reviewable by the courts even if it is raised after the award. Arbitrability goes to the essence of whether the issue comes within the arbitration agreement. However, since the federal policy does not presently permit review of the question of arbitrability in the courts, a provision permitting vacation when material evidence is excluded would violate this policy. Such a provision would conflict with the existing bar on court determination of arbitrability as set down in the "trilogy" cases. The burden is upon the courts to scrutinize each factual situation to determine if the action of the arbitrator has prejudiced the right of either party to a fair award.

The modification of an award by either the arbitrator or the court is a practical means of obtaining the award which should have been rendered but which, through error, was not.[93] The provisions for vacat-

88 See, *e.g.*, Lauria v. Soriano, 180 Cal. App. 2d 163, 4 Cal. Rptr. 328 (1960).

89 Atchison, T. & S.F. R.R. Co. v. Brotherhood of Railroad Trainmen, 229 Cal. App. 2d 607, 40 Cal. Rptr. 489 (1964).

90 Classic Togs, Inc. v. Joint Bd. of Cloak, Suit, Skirt, Reefer Makers' Union, Shirt Dep't, Local 231, I.L.G.W.U., 27 Misc. 2d 598, 211 N.Y.S.2d 653 (Sup. Ct. 1961).

91 United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574 (1960); United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

92 United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 598-99 (1960).

93 An example of provisions setting down grounds for modification by the arbitrator are the following section of the Cal. Civ. Proc. Code (Supp. 1965): Sec. 1286.6. Grounds for Correction of Award . . . the court, unless it vacates the award . . . , shall correct the award and confirm it as corrected if the court determines that:

(a) There was an evident miscalculation of figures or an evident mistake in the description of any person, thing, or property referred to in the award;

(b) The arbitrators exceeded their powers but the award may be corrected without affecting the merits of the decision upon the controversy submitted; or

ing an award contemplate an error which prejudices the rights of one or both of the parties and which is not capable of being corrected by merely modifying a specific part of the award. The errors which might make modification appropriate would be both correctable and relatively minute. The general provision for modification and the specific grounds cause no clash with the federal policy. In fact, it promotes the policy of favoring the arbitration process in labor disputes since the modification provision grants to the prejudiced party a means to correct the award without resorting to a new arbitration proceeding or to court action on the same issues.

If the state statute provides for modification by the court[94] but does not provide for modification by the arbitrator,[95] the statute can still safely be followed without fear of a clash with federal policy. The result of not giving the arbitrator this modification power is merely the elimination of one of the sources to which a party can resort. However, to allow no modification at all would be limiting the correction pro-

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(c) The award is imperfect in a matter of form, not affecting the merits of the controversy.

§ 1284 Correction of Award . . .

The arbitrators, upon written application of a party to the arbitration, may correct the award upon any of the grounds set forth in subdivisions (a) and (c) of Sec. 1286.6 . . . .

[94] The states with provisions in their arbitration statutes for modification of the award by the court include: Ariz. Rev. Stat. Ann. § 12-1513 (Supp. 1965); Cal. Civ. Proc. § 1286.6 (Supp. 1965); Conn. Gen. Stat. Ann. § 52-419 (1947); Fla. Stat. Ann. § 57.23 (Supp. 1964); Hawaii Rev. Laws § 188-10 (1955); Idaho Code Ann. § 7-908 (1947); Ill. Ann. Stat. ch. 10, § 113 (Smith-Hurd Supp. 1965); La. Rev. Stat. § 9:4211 (1950); Me. Rev. Stat. Ann. ch. 26, § 959 (1964); Md. Ann. Code art. 7, § 13 (1965); Mass. Ann. Laws ch. 150C, § 12 (1965); Minn. Stat. Ann. § 572.20 (Supp. 1965); Mo. Ann. Stat. § 435.110 (1949); Miss. Code Ann. § 291 (1956); Mont. Rev. Codes Ann. § 93-201-8 (1964); Nev. Rev. Stat. § 38.180 (1963); N.H. Rev. Stat. Ann. § 542:8 (1955); N.J. Rev. Stat. § 2A:24-9 (1952); N.Y. Civ. Prac. Law § 7511(c); N.C. Gen. Stat. § 1-560 (1943); N.D. Cent. Code § 32-29-09 (1960); Ohio Rev. Code Ann. § 2711.11 (Page 1953); Ore. Rev. Stat. § 33.330 (1963); Pa. Stat. Ann. tit. 5, § 171 (1963); R.I. Gen. Laws Ann. § 10-3-12 (1956); Tenn. Code Ann. § 23-515 (1955); Tex. Rev. Civ. Stat. Ann. art. 238 (Supp. 1965); Utah Code Ann. § 78-31-17 (1953); Wash. Rev. Code § 7.04.170 (1961); W. Va. Code Ann. § 5504 (1961); Wis. Stat. Ann. § 298.11 (1958); Wyo. Stat. Ann. § 1-1048.15 (Supp. 1963).

[95] The states with provisions in their arbitration statutes for modification of the award by the arbitrator include: Ariz. Rev. Stat. Ann. § 12-1509 (Supp. 1965)—but only on "submission to the arbitrators by the court"; Cal. Civ. Proc. § 1284 (Supp. 1965); Ill. Ann. Stat. ch. 10, § 109 (Smith-Hurd Supp. 1964); Md. Ann. Code art. 7, § 9 (Supp. 1965); Mass. Ann. Laws ch. 150C, § 8 (1965); Minn. Stat. Ann. § 572.16 (Supp. 1965); N.Y. Civ. Prac. Law § 7509; Tex. Rev. Civ. Stat. Ann. art. 232 (Supp. 1965); Wyo. Stat. Ann. § 1-1048.11 (Supp. 1963).

cedure that is necessary to promote arbitration. Therefore modification of an award should be possible even without a statutory provision.[96]

E. *Court Appointment of Arbitrators*

Since many of the state statutes do provide for court appointment of arbitrators,[97] the question arises whether a court may appoint the arbitrator in section 301 labor arbitration.[98]

The agreement of the parties may or may not provide for the appointment of the arbitrator either by the parties themselves or by a court. On the other hand, the agreement may stipulate that a court shall appoint an arbitrator if the parties cannot agree on an arbitrator or do not set up their own selection method.

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[96] The states with a provision in their arbitration statute for vacation of an award but no provision for modification of the award include: Alabama, Arkansas, Georgia, Iowa, Kansas, Kentucky, Nebraska, and Virginia.

[97] See, *e.g.*, Ohio Rev. Code Ann. § 2711.04 (Page 1953) which states in part:

> If, in the arbitration agreement, provision is made for a method of naming or appointing an arbitrator or an umpire, such method shall be followed. If no method is provided therein, or if a method is provided and any party thereto fails to avail himself of such method, or if for any other reason there is a lapse in the naming of an arbitrator or an umpire, or in filling a vacancy, then upon the application of either party to the controversy the court . . . shall . . . appoint an arbitrator or umpire, who shall act under said agreement with the same effect as if he had been specifically named therein.

[98] No cases could be located in any of the four states investigated relevant to this question. The states that have a provision in their statute for court appointment of the arbitrator include: Ariz. Rev. Stat. Ann. § 12-1503 (Supp. 1965); Cal. Civ. Proc § 1281.6 (Supp. 1965); Conn. Gen. Stat. § 52-411 (1958); Fla. Stat. Ann. § 57.13 (Supp. 1965); Hawaii Rev. Laws § 188-4 (1955); La. Rev. Stat. § 9:4204 (1950); Me. Rev. Stat. Ann. ch. 26, § 954 (1964); Md. Ann. Code art. 7, § 3 (1965); Mass. Ann. Laws ch. 150C § 3 (1965); Mich. Stat. Ann. 27A.5015 (1962); Minn. Stat. Ann. § 572.10 (Supp. 1965); Nev. Rev. Stat. § 38.050 (1963); N.H. Rev. Stat. Ann. § 542.4 (1955); N.J. Rev. Stat. § 2A:24-5 (1952); N.Y. Civ. Prac. Law § 7504; N.C. Gen. Stat. § 1-547 (1943); Ohio Rev. Code Ann. § 2711.04 (Page 1953); Ore. Rev. Stat. § 33.250 (1963); Pa. Stat. Ann. tit. 5, § 164 (1963); R.I. Gen. Laws Ann. § 10-3-6 (1956); Tenn. Code Ann. § 23-504 (1955); Tex. Rev. Civ. Stat. Ann. art. 226 (Supp. 1965); Utah Code Ann. § 78-31-4 (1953); Wash. Rev. Code § 7.04.050 (1961); Wis. Stat. Ann. § 298.04 (1958); Wyo. Stat. Ann. § 1-1048.5 (Supp. 1963).

Several states have provisions in their statutes which expressly or implicitly exclude the court from appointing the arbitrator. These states include: Ala. Code tit. 7, §§ 829, 830 (1958)—the arbitrator is to be chosen "by the parties"; Ill. Ann. Stat. ch. 10, § 103 (Smith-Hurd Supp. 1964)—"if the method of appointment of arbitrators is not specified in the agreement and cannot be agreed upon by the parties, the entire agreement shall terminate."; Kan. Gen. Stat. Ann § 5-202 (1964)—the arbitrator is to be "naturally agreed upon by the parties"; N.M. Stat. Ann. § 22-3-2 (1953)—the arbitrator shall be chosen "by the parties"; S.C. Code Ann. § 10-1902 (1962)—the arbitrator shall be chosen "by the parties."

At least one court has accepted the responsibility where the parties' agreement contained no provision for the appointment of an arbitrator.[99] Although one judge questioned whether this was a judicial function of the court, the majority felt that it was important for labor peace that the arbitration process not be allowed to fail and that the courts should exercise their "judicial inventiveness."

When the contract includes a provision for arbitration, it follows that the parties expected an arbitrator to be chosen. A failure to appoint an arbitrator would render such a collective bargaining provision abortive. If the contract is silent as to a method of selection, the parties may have simply made an incomplete agreement which, under contract law, the courts will not normally complete for them. Possibly, the parties either desired to determine the method of appointment later, or impliedly incorporated the state arbitration provision into the agreement. If this is the case, the intention of the parties would be that the court appoint the arbitrator in a needed situation. Thus, in accordance with the federal policy of favoring the arbitration process, the courts should appoint the arbitrator. But is this a judicial function? Congress in the Federal Arbitration Act, felt it was a judicial function since that act provided for court appointment of arbitrators in certain circumstances. Some state statutes have likewise provided for court appointment in certain situations. A prima facie application of the state statute would encourage the labor arbitration process by utilizing the court to appoint the arbitrator unless the intentions of the parties clearly indicate that at the time of the making of the contract no such appointment was desired.

What of the situation where the state arbitration statute does not provide for court appointment of an arbitrator?[100] If there is no provision in the contract either express or implied that the court should have this authority, there would be no clash with federal labor policy if the court did so even absent statutory authorization. Favoring the settlement of labor disputes by means of the parties own choosing is based upon a premise that the parties have so agreed and therefore this agreement ought to be given effect. An intent that the court appoint an arbitrator can be implied from past agreements and past proceedings of the parties and from the arbitration agreements within the same industry. Such an implication does not amount to giving the parties the

[99] Deaton Truck Line, Inc. v. Local 612, Teamsters Union, 314 F.2d 418 (5th Cir. 1962).

[100] The states with arbitration statutes that do not provide for court appointment of the arbitrator include: Alabama, Arkansas, Georgia, Illinois, Indiana, Iowa, Kentucky, Mississippi, Missouri, Montana, Nebraska, New Mexico, North Dakota, South Carolina, Virginia, and West Virginia.

authority to grant the courts the power to appoint the arbitrator. The power is always there for the parties to utilize. This procedure is analogous to the procedure in states which have provisions in their statutes for court appointment but require the party to make application to the court for appointment of the arbitrator. In those states with no such statutory provision the parties must "make application" at an earlier time.

Using the state statutes as a guideline, a liberal application of the court's power to appoint an arbitrator would encourage the effective use of the arbitration process, and thus, the grant of such a power would be appropriate in proceedings covered by section 301.

CONCLUSION

Section 301(a) of the Labor Management Relations Act gives the courts the right to specifically enforce collective bargaining contracts between employers and unions representing employees in industries affecting commerce. Arbitration agreements within such collective bargaining contracts also fall under section 301(a), and the right to have such contracts enforced is governed by a federal substantive law, however, state arbitration statutes can be applied prima facie in proceedings over such a contract.

Particular provisions of the state arbitration statutes may, however, adversely affect the stated federal policy of encouraging arbitration in labor disputes. For this reason arbitration statutes should not be applied per se. Courts must use the statutes as a guideline in determining what the federal substantive law should be. Courts could use a non-application, looking at all the statutes in general each time and attempting to create a general arbitration "statute" from the particular state statutes. This, however, is very impractical and would lead to more problems than it would solve. A third method is the prima facie application of the statutes; applying the particular statutory provisions unless they clashed with federal labor policy. This third method follows the order of the Supreme Court to utilize the state law in this area. Such an application will, by definition, be consistent with the federal policy of encouraging labor arbitration.

An analysis of several important sections of the state arbitration statutes show that a liberal view should be taken as to what provisions should be valid under section 301, and thus such provisions as those granting a stay of action, subpoena power to the arbitrator, vacation or modification of the award, and court appointment of the arbitrator, should be utilized to further labor arbitration agreements.

A problem, however, arises when there is no provision within the

statute for a particular situation, *e.g.*, court appointment of an arbitrator. After a determination of whether the lack of such a provision clashes with federal labor policy, the court should, if the court finds such a clash, make the appointment or take such other action as is necessary to effect such policy.

A prima facie application of state arbitration statutes in proceedings subject to section 301 will provide courts with the necessary guidelines to further the federal policy of favoring the arbitration process as well as permit maximum use of state arbitration statutes which are familiar to the local arbitrators, judges, and parties.

Edward A. Matto